FEB 19 1985

NO. 84-1184

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1984

THE CITY OF MONTGOMERY,
ET AL., PETITIONERS,

VS.

TATE WILLIAMS, RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT

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BEST AVAILABLE COPY

COUNTERSTATEMENT OF THE QUESTIONS INVOLVED

1. Should certiorari be granted to review the opinion of a court of appeals upholding a district court finding that Tate Williams, a black City of Montgomery fire fighter, was the victim of racial discrimination when he was terminated upon conviction of a felony while two white fire fighters who were previously convicted of a felony remained as fire fighters despite a mandatory policy which required termination upon conviction of a felony?

2. Should certiorari be granted to review the opinion of a court of appeals which affirmed a district court order holding that the City-County Personnel Board is not entitled to absolute immunity or good faith immunity where there is an abundance of judicial precedent in this

circuit to support the affirmance, and there are apparently no conflicts with decisions of other federal courts of appeals on the same matter?

3. Should certiorari be granted to review the opinion of a court of appeals which affirmed, on the ground that it was not clearly erroneous, the district court's finding of ultimate fact of racial discrimination in the termination of Respondent Tate Williams?

PARTIES

Parties to the proceeding are correctly set forth in Petitioners' Petition.

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OPINIONS AND JUDGMENTS IN THE COURTS BELOW

The Opinions of the United States Court of Appeals for the Eleventh Circuit and of the United States District Court for the Middle District of Alabama are included in the Appendix to the Brief of Petitioners.

JURISDICTION OF THE SUPREME COURT

Respondent does not contest jurisdiction of this Court to review this case pursuant to Title 28, United States Code, § 1254(1). Respondent submits, however, that this is not a proper case for review on writ of certiorari.

STATEMENT OF THE CASE

The Statement of the Case set out in Petitioners' Brief is correct; thus Respondent adopts same.

STATEMENT OF FACTS

Respondent adopts as a Statement of Facts those facts set out in the District Court's Findings and the Court of Appeals Order of Affirmance dated May 3, 1984.

> "The City of Montgomery, Alabama's (City) fire department policy required the discharge of any fire fighter convicted of a felony. In August, 1976, two white fire fighters were convicted of a felony, and the fire department discharged them. The employees, however, appealed their dismissals to the Montgomery City-County Personnel Board (Board), and the Board reinstated them.[1] In November, 1979, Tate Williams, the appellee, a black fire fighter, was convicted of a felony. The

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[1]The Board handles employment matters for the City and the County of Montgomery.

> fire department dismissed him, and he was not reinstated by the Board. Williams filed a complaint with the Equal Employment Opportunity Commission and the Commission issued him a "Right to Sue" notice. Williams then sued the City, the Board, and other appellants in district court seeking reinstatement to his job and backpay."

REASONS FOR DENYING THE PETITION

1. The Court of Appeals correctly held that the Montgomery City-County Personnel Board is an employer or agent of an employer as that term is defined under Title VII of the Civil Rights Act of 1964 and 42 U.S.C.S. § 2000e.

Petitioners argue that the issue of whether the Montgomery City-County Personnel Board is an agent of the City and County governments merits Supreme Court consideration. Respondent would respectfully disagree.

42 U.S.C.S. § 2000e defines "employer" as: "a person engaged in industry affecting commerce who has fifteen or more employees...and an agent of such a person ...."

The City-County Personnel Board is delegated the authority, pursuant to Alabama Act No. 2280, Section 5, to test and certify prospective employees, determine how employment lists are to be maintained and in what order eligibles shall be placed on the list, establish a pay plan for all classified employees, adopt working hours for employees and formulate and adopt rules governing examination, certification, appointment, and separation of employees. (See Exhibit D of Section 5 of Petitioners' Petition for Writ.)

The question thus arises whether the responsibilities outlined above

establish the Montgomery City-County Personnel Board as an agent of the employer, the City and County of Montgomery. Cases have held that such delegated responsibility establishes an agency relationship. In Howard v. Ward City, 418 F.Supp. 494, the court held that the board of commissioners who had the responsibility of raising salaries for sheriff deputies, and refused to raise the salary of a female deputy was an agent of the county and employer within the meaning of Title VII.

In Puntolillo v. New Hampshire Racing Commission, 375 F.Supp. 1089 (1974), the court held that the state racing commission and state prodding and breeding association, which controlled licensing of and stall space for driver trainers of harness horses were "employers" within contemplation of the equal employment

provisions of the Civil Rights Act of 1964.

In Manley v. Mobile County, Alabama, 441 F.Supp. 1351 (1975), the court held that where the county commission was required to provide the county sheriff with such quarters, supplies and equipment as were reasonably necessary for operation of his office, so that a money judgment against the sheriff or his department alone would have substantially less meaning or efficacy, the economic ties between the county commission and the sheriff's office provided sufficient nexus between the sheriff's department and the county to warrant the county's inclusion as "employer" defendant in an action brought under Title VII of the Civil Rights Act of 1964 alleging sex discrimination in employment on the part of the sheriff's department.

"The term employer under Title VII has been construed in a functional sense to encompass persons who are not employers in conventional terms, but who nevertheless control some aspect of an individual's compensation, terms, and conditions or privileges of employment....

"Holding responsible those who control the aspects of employment accorded protection under Title VII is consistent with the congressional intent that the act's effectiveness not be frustrated by employers delegating authority for its employees compensation, terms, conditions or privileges of employment to third persons...and that the act be interpreted liberally in order to achieve its remedial purpose of eradicating discrimination in employment...Spirt v. Teachers Insurance and Annuity Association, 475 F.Supp. 1298 at 1308 (1979). See also EEOC v. Sage Realty Company, Inc., 87 FDR 365 (1980)."

In Cannon v. State of Delaware, 523 F. Supp. 341 (1981), the plaintiff filed a claim against the personnel commission alleging a refusal to give her a hearing after her dismissal, its failure to explain why she was not offered a

hearing and the subsequent use of allegedly improper evidence at the hearing the commission did provide. The court found that it need not conclude that the personnel commission is an employer in the usual sense because the act expressly reaches the conduct of "any agent" who's conduct may violate the terms of 42 U.S.C.S. § 2000e-2(a).

The Court of Appeals correctly held that the City was an employer, and having delegated to the Personnel Board certain traditional employer functions, the Board, for purposes of Title VII, was agent for the City.

2. The Court of Appeals correctly held that the Montgomery City-County Personnel Board is not entitled to absolute or qualified immunity against a backpay award since by the very nature

of the members appointment and proceedings before the Board, the safeguards normally entering in the judicial process were absent.

In support of Petitioners' immunity argument, Petitioners cite Butz v. Economou, 437 U.S. 478, S.Ct. 2894 (1978), for the proposition that judicial immunity is extended to executive officials acting in a judicial capacity. Petitioners argue that when Petitioners carry out their legislatively mandated responsibility to govern the separation of an employee from employment, Petitioners are acting in a judicial capacity, and, therefore, immune from suit.

The Eleventh Circuit Court of Appeals held in this case that the Petitioners are not insulated from political influence; the City, the County, and judges of the county appoint Board members for a limited time;

the Board does not record its proceeding unless a party requests it; no judicial review of the Board's decision exists; therefore, the safeguards present in a federal agency hearing do not exist in the Board's hearing.

The Supreme Court held in Harlow v. Fitzgerald, 457 U.S. 800, 806, 102 S.Ct. 2727, 2732, 73 L.Ed.2d 396 (1982), that government officials whose special functions or constitutional status require complete protection from suits for damages --including certain officials of the executive branch, such as prosecutors and similar officials and the President, are entitled to defense of absolute immunity; however, executive officials are usually entitled to a qualified or good faith immunity.... Absolute immunity for judicial functions has extended no further than its justification would warrant. Id. 102 S.Ct. at 2735.

Qualified immunity as redefined by the Supreme Court in Harlow, supra, permits state officers to be subjected to suit only if the official's conduct clearly violates an established statutory or constitutional right of which a reasonable person would have known. Galvan v. Garmon, 710 F.2d 214 (5th Cir., 1983).

> "Absolute immunity has been extended to officials other than judges when their activities are intricately related to the judicial process and when they must exercise discretion comparable to judges. See e.g., Imber v. Patchman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976) (prosecutor initiating and pursuing a criminal prosecution); Simons v. Bellinger, 643 F.2d 774 (D.C. Cir., 1980) (members of a committee appointed by court of appeals to monitor unauthorized practice of law); Ashbrook v. Hoffman, 617 F.Supp. 474 (7th Cir., 1980) (partition commissioner effect in a divorce settlement); Stift v. Lynch, 267 F.2d 231 (1959) (justice of the peace)...
>
> "In assessing whether absolute immunity should shield the defendant, the court must

> consider three public policy factors: (1) "the functional comparability" of his judgment to those of a judge; (2) the nature of the controversy in which he participated; and, (3) the adequacy of safeguards to control unconstitutional conduct. See Crosby-Bey v. Jansson, 586 F.Supp. 96 (1984).

While Respondent does not concede that Petitioners have met their burden in establishing the first and second public policy factors necessary to invoke the doctrine of absolute immunity, Respondent limits his analysis of said public policy factors to the adequacy of safeguards to control unconstitutional conduct.

Probably the most important safeguard built into the judicial process is the insulation of the trier of fact from political influence. Butz, supra at 513. The Petitioners/Personnel Board consists of three members, one appointed by the County, one appointed by the City, and one appointed by the majority of the

circuit judges and probate judge of the County. The rules and regulations of the City and County Personnel Department provide that a permanent employee may be dismissed by an appointing authority, appointing authority meaning the governing body, officer, board, commission, person or group empowered to appoint or remove employees of the agency of which he is the responsible administrator.

The government, body, officer, etc., responsible for appointing members of the Personnel Board is the same government, body, officer, etc., with authority to dismiss an employee. The safeguards which extend to a judge absolute immunity are absent in the relationship of the Personnel Board members and the City and County governments.

The Butz, supra, court held that:

> "The process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by parties or other officials within the agency. When conducting a hearing... a hearing examiner is not responsible to, or subject to the supervision or direction of, employees or agents engaged in the performance of investigative or prosecution functions of the agency. A hearing examiner may not consult any person or party, including other agency officials, concerning a fact at issue in the hearing, unless on notice and opportunity for all parties to participate. Hearing examiners must be assigned to cases in rotation so far as is practicable. They may be removed only for good cause established and determined by the civil service commission after a hearing on the record. Their pay is also controlled by the civil service commission."

Id., 514-515.

The duties of the City-County Personnel Board are so interwoven with the operation of the City and County governments that it cannot be said that the Board possesses

the independence of an agency hearing examiner. The Board's duties include, but are not limited to, the testing and certifying of prospective employees, determining how employment lists are to be maintained and in what order eligibles shall be placed on the lists, establishing a pay plan for all classified employees, adopting working hours for employees, and formulating and adopting rules governing examination, certification, appointment and separation of employees. Indeed, the City-County Personnel Board is structured in such a manner that there exists the appearance that the decisions of the Board may be easily influenced by the appointing authorities. The Butz court also made reference to the transcript of testimony as being a necessary safeguard to the judicial process and designed to guarantee the independence

of a hearing examiner. The court stated:

> "A party is entitled to present his case by oral or documentary evidence, and the transcript of testimony and exhibits together with the pleadings constitute the exclusive record for decision."

Id. at 513.

An essential safeguard of a judicial proceeding is a record of the proceeding. The record tends to enhance truthfulness in the testimony of witnesses and provides a recording of the proceeding which may be reviewed on appeal. See Butz at 516 where the court compared an agency attorney in conducting a trial and presenting evidence on the record to the trier of fact to the functions that a prosecutor brings before a court.

The right to appeal a decision of the Board is also a necessary safeguard in the judicial process. Butz, supra at 512. The legislation creating the

Montgomery City-County Personnel Board does not allow for the appeal of a decision of the Board. The only option available to an employee for a decision adverse to him by the Personnel Board is to seek redress in the courts. Judicial review is limited to claims that the proceedings were unconstitutional. In most agency proceedings, a party may appeal the decision of the agency to an independent trier of fact. Such right is usually granted by statute or regulation. Most reviews are de novo reviews which are limited to the record made at the agency hearing. No such fact exists in the facts and circumstances of this case.

Therefore, Petitioners have failed to meet the public policy considerations necessary to afford Petitioners absolute immunity. The hearing afforded Respondent failed to offer the basic safeguards of a judicial hearing.

3. The application of the "clearly erroneous" standard of review by the Eleventh Circuit Court of Appeals to this case was correct.

Petitioners argue that the Eleventh Circuit Court of Appeals incorrectly applied the "clearly erroneous" standard of review in this case. In support of this position, Petitioners cite Mayo v. Pioneer Bank & Trust Company, 297 F.2d 392 (5th Cir., 1961) for the proposition that when the factual determination is primarily a matter of drawing inferences from undisputed facts or determining their legal implications, appellate review is far broader where disputed evidence and questions of credibility are involved.

The facts in this case are simple; at all times material to this case, the City of Montgomery had a policy which required the termination of any fire

fighter convicted of a felony. This policy was mandatory. Morgan and Evans are white fire fighters who were convicted of felonies and who were retained as fire fighters. Respondent Tate Williams, a black fire fighter, was convicted of a felony and terminated consistent with the Fire Department's mandatory policy. The district court found that Tate Williams was the victim of racial discrimination. The court of appeals held that this finding was not clearly erroneous.

In Pullman Standard v. Swint, 456 U.S. 273, the Supreme Court held that the question of whether the differential impact of a seniority system reflected an intent to discriminate on account of race was a pure question of fact subject to Rule 52(a)'s clearly erroneous standard; it is not a question of law and not a mixed question of law and fact.

The question of whether the Petitioners actions in terminating the Respondent, a black fire fighter after his conviction of a felony consistent with the Fire Department policy requiring mandatory termination upon conviction of a felony while retaining Morgan and Evans, white fire fighters, upon their conviction of felonies, resulted in a violation of the Respondent's constitutional rights is a pure question of fact, subject to Rule 52(a)'s clearly erroneous standard. The court further held in Pullman Standard, supra, that:

> "Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligations of a court of appeals to accept a district court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with 'ultimate' and those that deal with 'subsidiary' facts."

Therefore, the Court of Appeals application of the "clearly erroneous" standard of review in this case was not error.

CONCLUSION

Petitioners raise several issues in their petition, none of which begin to meet the standards this Court would apply for reviewing a writ of certiorari. Indeed, all of the issues have been addressed by the federal courts of appeals and there appears to be uniformity in the decisions of the federal courts of appeals. Whether legislatively mandated boards which govern access to employment are employers under Title VII of the Civil Rights Act of 1964 does not present a novel issue, or an issue which has not been adequately addressed by the federal courts of appeals.

The issue of immunity for boards serving in a quasi-judicial capacity has also been adequately addressed by the federal courts of appeals. Consistent standards have been established by the courts of appeals to determine when a board, body or individual is serving in a judicial capacity and thus entitled to immunity.

Lastly, the standard of review of cases tried by a judge without a jury in federal district courts is well established in the Federal Rules of Civil Procedure and is supported with ample precedent from this Court.

Petitioners Petition for Writ of Certiorari should, therefore, be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Solomon S. Seay, Jr., a member of the Bar of the Supreme Court of the United States and the attorney for the Respondent Tate Williams, hereby certify that on this the 15th day of February, 1985, I did serve the requisite number of copies of the foregoing on the attorneys for all of the other parties in the Court of Appeals, by mailing the same to them, first-class postage prepaid and addressed as follows:

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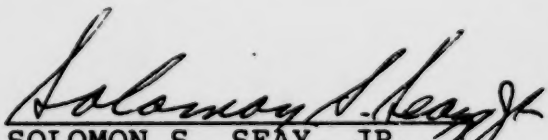

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